FEB 8 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 757

CITY OF ST. PETERSBURG, a Municipal Corporation, Organized and Existing under the Laws of the State of Florida, and JACK PURYEAR, As Director of the Bureau of Recreation of the City of St. Petersburg, Florida,
Petitioners,

vs.

FRED ALSUP, WILLET WILLIAMS, NAOMI WILLIAMS, RALPH WIMBISH, CHESTER JAMES, SR., and HAROLD DAVIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEWIS T. WRAY,
HARRY I. YOUNG,
FRANK D. McDEVITT,
Municipal Building,
St. Petersburg, Florida,
Attorneys for Petitioners.

R. L. MIDDLEHALL, INC., 1108 OAK STREET, KANSAS CITY 6, MO., HARRISON 1-3030

SUBJECT INDEX

The Opinion Below 2
Jurisdiction 2
Question Presented 2
Constitutional Provisions Involved 3
Statement of the Case 3
Reasons for Granting the Writ 4
Conclusion 6

TABLE OF CASES

Dawson v. *Mayor and City Council of the City of Baltimore*, 220 F. 2d 386, 350 U. S. 887 5
Ide v. *St. Cloud*, 8 So. 2d 924 5
Mayor and City of Baltimore v. *State*, 195 Atl. 571 5
Nixon v. *Condon*, 286 U. S. 73, 88 5
Pickett v. *City of Jacksonville*, 20 So. 2d 484 5
South Carolina v. *U. S.*, 199 U. S. 437 5
Trenton v. *New Jersey*, 262 U. S. 182 4
Vilas v. *Malina*, 220 U. S. 345 5

IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

CITY OF ST. PETERSBURG, a Municipal Corporation, Organized and Existing under the Laws of the State of Florida, and JACK PURYEAR, As Director of the Bureau of Recreation of the City of St. Petersburg, Florida,
Petitioners,

vs.

FRED ALSUP, WILLET WILLIAMS, NAOMI WILLIAMS, RALPH WIMBISH, CHESTER JAMES, SR., and HAROLD DAVIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 19, 1956.

THE OPINION BELOW.

The opinion and judgment of the U. S. Court of Appeals for the Fifth Circuit is appended to this petition, pages A-1 to A-6.

JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked is that the question presented is an important question of Federal law that has not been decided by this Court but in view of its importance to this petitioner and to other municipalities of like nature it should be decided by the Supreme Court of the United States.

Statutory authority for the jurisdiction of this Court is contained in 28 U. S. Code, Sec. 1254(1).

QUESTION PRESENTED.

The petitioner took the sole position below that by the decisions of this Court and other courts of last resort that municipalities operating in their proprietary capacity are not in fact acting as an arm of the state nor exercising the police powers of the state and that the 14th Amendment of the Constitution being a limitation upon the acts of the states is not applicable to the proprietary operations of municipalities, thus but one question is presented:

ARE THE RESTRICTIONS CONTAINED IN THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES APPLICABLE TO MUNICIPALITIES OPERATING IN THEIR PROPRIETARY CAPACITY?

CONSTITUTIONAL PROVISIONS INVOLVED.

This cause involves the application of Section 1 of the 14th Amendment of the Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This case arose in the U. S. District Court for the Southern District of Florida wherein the respondents brought action for declaratory decree and for injunction, contending that they were negroes and were denied admission to the Spa Pool and bathing beach operated by the petitioner, City of St. Petersburg through petitioner Jack Puryear as its Director of Recreation and that the denial of admission was a violation of their rights under the provisions of the 14th Amendment. The petitioners admitted that negroes were denied admission to said Spa Pool and beach but denied their admission was in violation of the 14th Amendment by reason of the fact that the pool and beach was operated by the municipality in its proprietary capacity and that the 14th Amendment being a prohibition upon acts of the states, was not applicable to a municipality acting in its proprietary or private capacity. The District Court upon Motion for Summary Final Decree granted the injunction, and while holding that the municipality

did operate this utility in its proprietary capacity, it was nevertheless subject to the terms of the 14th Amendment. Appeal was taken by the petitioner to the U. S. Court of Appeals for the Fifth Circuit and on December 19, 1956, opinion and judgment was entered by said court sustaining the District Court, said opinion and judgment being appended to this petition.

REASONS FOR GRANTING THE WRIT.

As the pleadings disclose, the petitioner, City, operates its Spa Pool and breach as a business, charging a fee for admission and is financially unable to operate this utility at a loss. Petitioner's answer likewise alleges that under the present social system existing in this community, the operation of this pool and beach on a non-segregation basis would result in the closing of the pool and beach for lack of revenue and deprive the citizens of the city of this facility.

The above is not presented to this Honorable Court as an argument in support of our contention that the 14th Amendment is not applicable to certain operations of municipalities, but to show the importance of the question to the petitioner City, and to other cities in a similar situation, and why this court should review the judgment sought to be reviewed.

Further the petitioner would show to the court that the question presented here has not in fact been decided by the Supreme Court of the United States. The cases cited in the opinion of the Court of Appeals, while dealing with the 14th Amendment in essence present a different question than is presented here. *Trenton* v. *N. J.*, 262 U. S. 182, 191-192, was an effort upon the part of a municipality to in-

voke the protection of the 14th Amendment. *Nixon* v. *Condon*, 286 U. S. 73, 88, involved the right of suffrage which is clearly governmental in character.

In the case of *Dawson* v. *Mayor and City Council of the City of Baltimore*, 220 F. 2d 386, 350 U. S. 877, the question of a municipality operating in its proprietary function was not presented. It could not have been presented for the substantive law of the State of Maryland, Maryland municipalities operate pools and recreation in their governmental capacity. *Mayor and City Council of Baltimore* v. *State*, 195 Atl. 571.

On the other hand Florida cities by the substantive law of Florida operate swimming pools and beaches in their proprietary capacity. *Pickett* v. *City of Jacksonville*, 20 So. 2d 484, 155 Fla. 439; *Ide* v. *St. Cloud*, 8 So. 2d 924, 150 Fla. 835.

This Honorable Court has recognized the difference between the governmental operation and the proprietary operation of municipalities and the different rights, powers and duties applicable to each in *Vilas* v. *Manila*, 220 U. S. 345, and *South Carolina* v. *U. S.*, 199 U. S. 437.

CONCLUSION.

We respectfully ask this court to review a decision upon an important question that directly affects a municipal operation and a question that has not been directly presented to nor passed upon by this Court.

We sincerely request this Court to issue its Writ of Certiorari and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

LEWIS T. WRAY,
HARRY I. YOUNG,
FRANK D. MCDEVITT,
City Hall,
St. Petersburg, Florida,
Attorneys for Petitioners.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 16100.

CITY OF ST PETERSBURG, etc., and JACK PURYEAR, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, *Appellants*,

versus

FRED ALSUP ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(December 19, 1956.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: The district court enjoined the appellants from refusing to allow the appellees and other negroes similarly situated to use the municipal beach and swimming pool on the same basis as white citizens of the municipality. On the authority of *Dawson* v. *Mayor and City Council of the City of Baltimore*, 4th Cir., 220

F. 2d 386, affirmed 350 U. S. 877, the judgment should be affirmed, unless the cases are distinguishable.

The distinction urged by appellants is that the City of Baltimore operates its parks and swimming facilities in its governmental capacity,[1] while the City of St. Petersburg operates its swimming pool and beach in its proprietary capacity.[2] Further elaborating their position, the appellants argue in brief:

> "The appellant City operates the Municipal Spa Beach and swimming pool involved in this litigation in its proprietary capacity. Under the decisions of the Courts it has not only the right but the duty to operate this pool and beach as a business enterprise and for the best interest of the inhabitants of the City who are stockholders, so to speak, in this enterprise.
>
> "The answer avers in substance that the City operated a negro pool in the very heart of the negro area and that said pool operated at a considerable financial loss and was finally forced to close for lack of patronage. It is further alleged that, due to a long social practice and custom, if negroes were admitted to the beach and pool in controversy, white patronage would cease or practically cease and that the City would be forced to close this pool as it would not have sufficient funds to continue its operations.
>
> "If the City is to be charged with the duty and given the legal right to operate this utility as a private business and for the best interest of the inhabitants

---

[1] *Mayor and City Council of Baltimore* v. *State*, 195 Atl. 571.

[2] *Town of Riviera Beach* v. *State*, 53 So. 2d 828; *Pickett* v. *City of Jacksonville*, 20 So. 2d 484; *Ide* v. *City of St. Cloud*, 8 So. 2d 924; *City of Tampa* v. *Easton*, 198 So. 753; *State* v. *City of Daytona Beach*, 158 So. 300; *City of Lakeland* v. *Amos*, 143 So. 744; *Hamler* v. *City of Jacksonville*, 122 So. 220.

of the City, the 14th Amendment has no application. It certainly cannot be said that a forced closing of the pool would be for the best interest of anyone.

"To hold that the 14th Amendment of the Constitution is applicable to a city operating in its proprietary capacity in the light of the numerous decisions defining this method of operation would be to read into the 14th Amendment something that simply is not there, nor ever was intended to be there."

It becomes obvious, at once, that, if appellants' contention be accepted, the Constitution would operate with different effect in Maryland and in Florida; and probably also in various other states. The same contention has been unsuccessfully urged to shield municipalities from their own states and was thus answered in *Trenton* v. *New Jersey*, 262 U. S. 182, 191-192:

"The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris* v. *District of Columbia*, 256 U. S. 650, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and

maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question." (Marginal footnotes omitted.)

The fact that under West Virginia decisions municipal operation of a swimming pool was a proprietary activity has been held by a district court not to alter the constitutional right of an individual citizen to equality of opportunity in the use of the pool. *Lawrence* v. *Hancock*, S. D. W. Va., 76 F. Supp. 1004, 1008.

A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the Fourteenth Amendment. See *Nixon* v. *Condon*, 286 U. S. 73, 88. It is doubtful whether a municipality[3] may ever engage in purely private action that would not be action of the state. See *Civil Rights Cases*, 109 U. S. 3; *Buchanan* v.

---

[3]Except possibly in some fiduciary capacity. See *Estate of Stephen Girard*, Pa. Sup. Ct., November 12, 1956, 25 L. W. 2214, 2215, m/s.

Warley, 245 U. S. 60. Certainly this is not such a case. In its operation of the municipal beach and swimming pool the City of St. Petersburg comes squarely within the broad class long ago defined in *Ex parte Virginia*, 100 U. S. 339, 347:

> "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

It is no answer to say that the beach and pool cannot be operated at a profit on a nonsegregated basis, and that the City will be forced to close the pool. Of course, financial loss cannot justify illegal operation; and, unfortunate as closing the pool may be, that furnishes no ground for abridging the rights of the appellees to its use without discrimination on the ground of race so long as it is operated. *Department of Conservation and Development* v. *Tate*, 4th Cir., 231 F. 2d 615, 616.

The judgment is therefore

AFFIRMED.

A True Copy:

Teste:

John A. Feehan, Jr.,
Clerk.

By /s/ Clara R. James,
Deputy Clerk of the United States Court of Appeals for the Fifth Circuit.

(Seal)

Judgment.

Extract from the Minutes of December 19, 1956.

No. 16100.

CITY OF ST. PETERSBURG, etc., and JACK PURYEAR, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida,

versus

FRED ALSUP ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, City of St. Petersburg, etc., and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * *